

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

MAY 17 2011

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

JACKIE JOE ANEAS,)	2 CA-CV 2010-0203
)	DEPARTMENT B
Petitioner/Appellant,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 28, Rules of Civil
MARGUERITE LOUGHRAN,)	Appellate Procedure
)	
Respondent/Appellee.)	
_____)	

APPEAL FROM THE SUPERIOR COURT OF GILA COUNTY

Cause No. DO980249

Honorable Gary V. Scales, Judge Pro Tempore

REVERSED AND REMANDED

David Alan Dick and Associates
By David Alan Dick

Chandler
Attorneys for Petitioner/Appellant

Thompson, Montgomery & DeRose
By Jerry B. DeRose

Globe
Attorneys for Respondent/Appellee

K E L L Y, Judge.

¶1 Appellant Jackie Anneas appeals from the trial court's denial of his motion to reconsider its order denying a hearing on his motion to modify custody for his minor son. Appellee Marguerite Loughran, the child's mother, contends only that we lack

jurisdiction to consider this appeal. Because we may treat Loughran's failure to respond on the merits as a confession of error as to any debatable issue, we conclude the trial court abused its discretion. We therefore reverse and remand. *See In re 1996 Nissan Sentra*, 201 Ariz. 114, ¶ 7, 32 P.3d 39, 42 (App. 2001).

Background

¶2 After Loughran gave birth to a child in 1995, Aneas filed a petition to establish paternity and determine custody and child support. He sought physical and legal custody of the child, "with [Loughran] having visitation." After considering the relevant factors listed in A.R.S. § 25-403, the trial court awarded custody to Aneas, with "liberal visitation rights granted to the mother."

¶3 At the end of 1999, Loughran requested that the court enter "a more definitive order clarifying the parties' visitation rights/parenting time." During the next eight years, Aneas filed additional motions to modify Loughran's visitation and co-parenting time.

¶4 In May 2010, alleging Loughran had "major parenting and mental health issues," Aneas filed the present petition to modify custody, support, and establish co-parenting time. In the petition, Aneas requested "sole custody" of the child subject to "specific co-parenting time," notwithstanding that he had been awarded "care, custody and control" of his son in the initial custody determination. Although visitation and co-parenting time were modified several times after the initial determination, we are unable to locate, nor have we been directed to, any place in the record where the initial custody

determination was modified.¹ We thus assume the 2010 petition could only have been to modify visitation and co-parenting time, not to obtain the sole custody which Aneas already had been granted.

¶5 In response to the petition, Loughran provided the trial court with opposing affidavits in accordance with A.R.S. § 25-411. The fourteen affidavits were from various individuals, including her physician, brothers, former co-workers, employees at restaurants where she had taken the child, and the daughter of a live-in caregiver for her father. Following its review of these affidavits,² the court issued an unsigned order, stating that, “[a]fter giving full consideration to the matter, the Court does not find adequate cause to set a hearing on Petitioner’s Motion to Modify Custody.”

¶6 Subsequently, Aneas filed a motion to reconsider and requested that the trial court interview the child. The court denied this motion in an unsigned minute entry filed August 5, 2010. This appeal followed. Because the August 5 minute entry was not signed, we revested jurisdiction in the trial court for the purpose of “allowing counsel to obtain [a signed] order.” On January 13, 2011, the court issued a signed order denying Aneas’s motion for reconsideration and to interview the child.³

¹Loughran concedes that Aneas has sole custody of the child.

²Two additional affidavits also were submitted but it appears that the trial court did not consider them.

³A “notice of appeal is deemed effective after entry of the signed order.” *Tripati v. Forwith*, 223 Ariz. 81, ¶ 17, 219 P.3d 291, 295 (App. 2009).

Discussion

¶7 As a preliminary matter, we note that we have jurisdiction pursuant to A.R.S. §§ 12-120.21 and 12-2101. Loughran contends that the order denying Aneas's motion to reconsider and to interview the child is not an appealable order and thus we lack jurisdiction to review the decision. Although Aneas's motion was titled "motion to reconsider," it was in fact a motion for new trial and is subject to this court's jurisdiction under § 12-2101(F)(1).

¶8 Regardless of a motion's caption, "if its substance shows clearly that it seeks relief under Rule 59(a)[, Ariz. R. Civ. P.,] on the grounds set forth in that rule with appropriate reference to the rule as authority for the motion, the motion must be treated as a motion for new trial." *See James v. State*, 215 Ariz. 182, ¶ 13, 158 P.3d 905, 908 (App. 2007), quoting *Hegel v. O'Malley Ins. Co.*, 117 Ariz. 411, 412, 573 P.2d 485, 486 (1977). Here, although the caption of Aneas's motion characterizes it as a motion to reconsider, Aneas filed his motion "pursuant to [R]ules 83 and 84[,]" Ariz. R. Fam. Law P. Rule 83, the family law procedural rule governing motions for new trial, "is based on Rule 59, [Ariz. R. Civ. P.]" Ariz. R. Fam. Law P. 83 cmt.; *see also Craig v. Craig*, 225 Ariz. 508, n.1, 240 P.3d 1270, 1272 n.1 (App. 2010). Because Aneas cited Rule 83 and specified grounds contained within the rule in support of his motion, we treat his "motion for reconsideration" as a motion for new trial, and refer to it as such

hereafter. *See id.* (treating motion for reconsideration as motion for new trial where underlying order “depriv[ed] the moving party of a fair trial”).⁴

¶9 In his motion, Aneas asserted the trial court “committed an error of law in weighing the affidavits submitted by the parties and therefore pursuant to Rule 83(a) 1, 5, and 6[,]” it should hold a hearing on his motion to modify custody. Section 25-411(F) instructs that “[t]he court shall deny [a] motion [under this section] unless it finds that adequate cause for hearing the motion is established by the pleadings.” Thus, the court’s denial of a hearing on the motion effectively denied the motion itself. *See Desmond v. J.W. Hancock Enters.*, 123 Ariz. 474, 476, 600 P.2d 1106, 1108 (1979). “We review the denial of a motion for new trial . . . for an abuse of discretion.” *Mullin v. Brown*, 210 Ariz. 545, ¶ 2, 115 P.3d 139, 141 (App. 2005).

¶10 Loughran’s sole argument in her answering brief was that this court lacks jurisdiction. We may treat a party’s failure to respond as a confession of error as to any debatable issue, and we do so here. *1996 Nissan Sentra*, 201 Ariz. 114, ¶ 7, 32 P.3d at 42; *Gonzales v. Gonzales*, 134 Ariz. 437, 437, 657 P.2d 425, 425 (App. 1982). We conclude there is a fairly debatable issue whether the trial court should have granted Aneas’s motion for new trial on the ground that his pleadings established adequate cause

⁴We lack jurisdiction to review the order denying a hearing entered on June 23 because it was not a signed final judgment and was not listed in Aneas’s notice of appeal. *See* Ariz. R. Fam. Law P. 81(A) (“All judgments shall be in writing and signed by a judge or a court commissioner”); *Premier Fin. Servs. v. Citibank*, 185 Ariz. 80, 87, 912 P.2d 1309, 1316 (App. 1995) (no jurisdiction to review rulings not contained in notice of appeal). We therefore review only the propriety of the August 5 order denying his motion for new trial. And, by reviewing the denial of that motion, we are essentially determining whether the court erred in dismissing Aneas’s petition without a hearing.

for a hearing. We consider Loughran's failure to respond to this argument on appeal as a confession of error, and we therefore conclude the trial court abused its discretion by denying the motion for new trial.

Disposition

¶11 The trial court's denial of Aneas's motion for new trial is reversed and the case is remanded for further proceedings consistent with this decision.

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge

CONCURRING:

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Judge